COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gaebel v. Lipka,*
2017 BCCA 432

Date: 20171213
Docket: CA44186

Between:

Bradley Gaebel

Appellant
(Plaintiff)

And

Gordon Lipka and Stacey Gaebel

Respondents
(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated December 22, 2016 (*Gaebel v. Lipka*, 2016 BCSC 2391, Vancouver Registry Docket M131020).

Counsel for the Appellant:	D.G. Cowper, Q.C. G. Cameron
Counsel for the Respondents:	R.C. Brun, Q.C. J.J.L. Brun
Place and Date of Hearing:	Vancouver, British Columbia September 29, 2017
Place and Date of Judgment:	Vancouver, British Columbia December 13, 2017

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Stromberg-Stein

Summary:

Mr. Gaebel appeals the dismissal of his claim in negligence for damages arising from a single motor vehicle accident. The accident occurred when Mr. Gaebel was the passenger in a motor vehicle driven by the respondent, Mr. Lipka. The two men were driving home from work when Mr. Lipka drove onto the shoulder of a gravel road, and the vehicle fishtailed, hit an embankment and flipped over multiple times. The trial judge found the driver did not breach the requisite standard of care in the circumstances and dismissed the claim. Although not required, the judge considered the issue of damages but determined Mr. Gaebel had failed to establish on a balance of probabilities that his injuries were caused by the accident. Held: appeal allowed. The trial judge erred in finding Mr. Lipka did not drive onto the shoulder of the road. In the circumstances, driving onto the shoulder of the road and losing control gave rise to a prima facie inference of negligence. Mr. Likpa advanced no explanation as to how the accident may have occurred absent negligence on his part and is therefore fully liable. The trial judge's finding that Mr. Gaebel suffered no injuries as a result of the accident was clearly wrong. A new trial is required to determine damages.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This case concerns a single vehicle accident. The trial judge, in reasons indexed at 2016 BCSC 2391, found the driver, Gordon Lipka, was not negligent when he lost control of his vehicle. She further found the plaintiff, Bradley Gaebel, who was a passenger in the vehicle, had failed to prove the accident caused him any injury. Mr. Gaebel submits both findings are the product of palpable and overriding factual errors, as well as errors of law and principle.

[2] For the reasons that follow, I find that the driver's negligence caused the accident. I would order a new trial on the question of damages.

BACKGROUND

[3] On the afternoon of March 11, 2011, Mr. Gaebel, then 30-years old, was a passenger in a Kia Sorento driven by the respondent, Mr. Lipka. Mr. Lipka was the common-law partner of Mr. Gaebel's sister, the respondent Stacey Gaebel. Ms. Gaebel owned the Sorento and Mr. Lipka was driving it with her consent.

[4] Mr. Gaebel and Mr. Lipka were co-workers at a forestry operation. At the time of the accident, they were driving home from work on Stillwater Main Road, a gravel logging road about 1.5 km in length which intersects Highway 101 near Powell River, British Columbia. The visibility and weather conditions were good, and the vehicle was in proper mechanical condition. Mr. Lipka was familiar with the road and had driven it many times. As the vehicle approached an intersection, Mr. Lipka lost control, the vehicle fishtailed, crossed the road to the opposite side, travelled up onto an embankment, launched into the air and rolled over three times before landing.

[5] Mr. Gaebel claimed the accident was caused by Mr. Lipka's negligent driving. He also claimed he was injured in the accident. The most serious injuries he alleged were to his right shoulder and collarbone.

[6] Mr. Lipka's position was that his driving did not breach the applicable standard of care. He also submitted that Mr. Gaebel's injuries were not serious and that the complaints Mr. Gaebel raised at trial were related to pre-existing conditions and not caused by the accident. He submitted that Mr. Gaebel was not entitled to any damages.

THE TRIAL REASONS

[7] The trial judge noted most of the facts concerning the accident were not disputed. She explained that Mr. Gaebel bore the burden of proving on a balance of probabilities that the accident was caused by Mr. Lipka's failure to meet the standard of care expected of a prudent driver in the circumstances.

[8] The trial judge found that at the time of the accident Mr. Lipka was driving between 60 and 70 km/h. She noted that Mr. Lipka testified that as he rounded a corner, he slowed down and moved towards the right side of the road. He said this action was necessary to avoid a potential head-on collision with any approaching logging trucks. There were in fact no other vehicles approaching on the road that day. The trial judge found the evidence established that Mr. Lipka did not drive onto the shoulder. In that regard she said:

> [17] If the plaintiff relies on a finding that Mr. Lipka intentionally drove onto the loose gravel of the shoulder, I do not agree the evidence establishes that fact. I find that Mr. Lipka did not drive onto the shoulder. Rather, he moved towards the shoulder, and believed that his right tires got caught in the loose gravel which caused him to lose control. [Emphasis added.]

[9] The trial judge held that she could not rely on the accident itself as "proof" that Mr. Lipka breached the standard of care. In this regard, she said:

> [22] In this case, I need persuasive evidence that Mr. Lipka did not meet the standard of care. As the defendant points out, the doctrine of *res ipsa loquitor* is no longer valid: see *Fontaine v. British Columbia (Official Administrator*), [1998] 1 S.C.R. 424 at para. 26. A plaintiff cannot succeed in establishing negligence for an accident by relying on the collision itself as "proof" that the defendant has breached the standard of care.

[10] Mr. Lipka testified that on the day of the accident he did not depart from his normal driving behaviour. As was his practice, he slowed down and moved towards the shoulder as he approached the curve near the intersection. The trial judge found that to be prudent and normal driving behaviour on a gravel road. She said it also accorded with common sense about how to drive on a road which is not wide enough to accommodate two vehicles side-by-side unless one moves towards the shoulder.

[11] The trial judge was not satisfied that Mr. Gaebel had proven on a balance of probabilities that on the day of the accident the road conditions were unusual in a way that required any change to the normal driving behaviour of a person familiar with the road, such as Mr. Lipka.

[12] The trial judge stated Mr. Gaebel had failed to prove that Mr. Lipka's speed was excessive. In that regard, she reasoned:

> [34] I must assess whether Mr. Lipka was driving at excessive speed given all the circumstances, especially the condition of the vehicle and of the road: see *Hutton*. I focus on the facts I have found. Those facts are that it was not raining and visibility was good. There was no evidence to suggest any mechanical or other problem with the vehicle. Mr. Lipka was not intoxicated or tired, he was not in a hurry to get anywhere, he was very familiar with the route being travelled, and he was driving below the speed limit. There was no evidence that he was distracted while driving. While there was water in the ditch beside the road and the shoulders were wet, I have found those factors

> do not necessarily constitute conditions that required a driver to take extra precautions. Together with the paucity of evidence as to what a safe speed would be given the road conditions that day, I conclude the plaintiff has not proven that Mr. Lipka's speed was excessive.

[13] In the trial judge's view, the evidence established this was a true accident where no one could be held at fault for the vehicle rolling over. She found Mr. Lipka met the standard of care, and accordingly there was no negligence and he was not liable for any damages.

[14] Having found Mr. Lipka was not negligent, the trial judge noted it was unnecessary for her to address the question of damages. However, in the event she was wrong on the issue of liability, the trial judge purported to assess damages and concluded Mr. Gaebel had failed to prove the accident had caused him any loss or damage. However, the trial judge did not undertake an exhaustive review of damages. She limited her reasons to an assessment of Mr. Gaebel's credibility (or lack therefore) and a review of the evidence of two experts called by Mr. Gaebel.

[15] In her reasons, the trial judge noted Mr. Gaebel relied on two expert medical reports to establish the extent of injuries he claimed were caused by the accident. One report was authored by Dr. Armstrong, a chronic pain specialist. The other was authored by Dr. Chin, an orthopaedic surgeon. The trial judge concluded she could not rely on either Dr. Armstrong or Dr. Chin's opinions about the cause of Mr. Gaebel's injuries because the medical history provided to them by Mr. Gaebel was not consistent with the evidence at trial.

POSITIONS ON APPEAL

[16] Mr. Gaebel submits the trial judge's liability finding contains two fundamental flaws. First, he submits her finding that Mr. Lipka did not drive onto the shoulder of the road was a palpable and overriding error. Second, he submits the trial judge misdirected herself on the principles governing the law of negligence. In particular, he says the trial judge erred in failing to consider whether a departure from the roadway could give rise to an inference of negligence. He submits the evidence clearly disclosed a *prima facie* case of negligence which Mr. Lipka did nothing to

dispel or refute. He asks this Court to set aside the trial judge's order and substitute a finding that Mr. Lipka was entirely liable for the injuries he suffered as a result of the accident.

[17] In regard to the question of damages, Mr. Gaebel submits the trial judge's finding that he suffered no injuries as a result of the accident is clearly wrong. Mr. Gaebel says the trial judge focused only on his shoulder injury and failed to address the other injuries he sustained. He further submits the trial judge's credibility analysis was based on a fundamental misapprehension of the evidence. If the liability finding is reversed on appeal, Mr. Gaebel seeks a new trial on damages.

[18] The respondents submit the trial judge did not ignore evidence, err in her assessment of the evidence or fail to have regard to relevant considerations. In particular, they submit the trial judge did not commit a palpable overriding error in concluding there was no negligence, and that she correctly interpreted and applied the governing legal principles. They submit this Court should not intervene and substitute its opinions for those of the trial judge.

[19] In regard to the trial judge's damages assessment, the respondents submit that the main issue at trial turned on Mr. Gaebel's alleged shoulder injury, which the trial judge found was not caused by the accident. They submit that any remaining damages are minimal and if the liability finding is set aside the question of damages relating to the remaining injuries should be referred back to the trial judge.

DISCUSSION

A. Liability

[20] Mr. Gaebel submits the trial judge's finding that Mr. Lipka did not drive onto the shoulder of the road was a palpable and overriding error that should be reversed. He submits that Mr. Lipka's testimony on discovery, in chief and in cross-examination, all confirm that he in fact did drive onto the shoulder contrary to the trial judge's finding.

[21] On his examination for discovery, which was read in at trial, Mr. Lipka testified:

> Q Why don't you tell me in your own words how the accident happened.
>
> A We were driving and there was a soft shoulder. In the accident the vehicle slid out and I overcorrected, ended up in the tulies. I said "hold on" and then I helped the plaintiff out of the vehicle. Well, I mean opened the door and we both exited [sic] … existed on our free will.

[22] In his evidence in chief, Mr. Lipka testified:

> Q Could you describe the accident for us, please.
>
> A Yes. We were driving along. I remember catching the soft shoulder road on the -- on the road, and the rear end of the vehicle kicked out. I then overcorrected, realized that I lost control of the vehicle, said, "Hold on." And we ended up hitting a bank, and we were airborne. Excuse me.

[23] On cross-examination, Mr. Lipka testified:

> Q And you were driving around this curve to the right when your front wheel hits the shoulder. It's caught on the shoulder; is that correct?
>
> A I caught the shoulder and slid out. Yes.
>
> Q And it was the right front wheel that caught the shoulder?
>
> A It was the right side of the vehicle. Yes.
>
> …
>
> Q So the right front wheel hit the soft shoulder, and that caused your vehicle to slide out, and it all followed from there?
>
> A Yes. It was spiralling down road effect, yes.
>
> …
>
> Q Have you ever encountered soft shoulders on that road before?
>
> A There -- I drive the road every day, so when it's graded and it's wet, as you can see in the picture, yeah, there's soft shoulders.
>
> Q So you knew it could have soft shoulders?
>
> A I knew that the road could have soft shoulders. I've never had this happen to me, so I wasn't aware of the -- the outcome of clipping one of those soft shoulders, no.

[24] In my respectful opinion, the trial judge's finding that Mr. Lipka did not drive onto the shoulder is a clear error and contrary to his evidence. For the reasons that follow, I find the error also to be overriding.

[25] The trial judge's task was to determine whether or not the accident was caused by the driver's negligence. In her reasons, the trial judge cites *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, for the proposition that a plaintiff cannot succeed in establishing negligence for an accident by relying on the collision itself as proof that the defendant had breached the standard of care. With respect, that statement does not accurately capture the test established in *Fontaine*. The test arising from *Fontaine* was set out by this Court in *Nason v. Nunes*, 2008 BCCA 203:

> [8] … Instead, the Court provided a simpler formulation of the correct approach that refers only to the end of the trial: the trier of fact should, Major J. said, weigh all the evidence, both direct and circumstantial, to determine whether the plaintiff has established a *prima facie* case. If he has, the defendant must "negate" that evidence, failing which the plaintiff will succeed.

[26] While the Court in *Fontaine* rejected the argument that an inference of negligence arises whenever a vehicle goes off the road in a single-car accident, it remains for the judge to determine whether an inference should be drawn as a matter of fact in a particular case where a vehicle leaves the road or a driver loses control: *Nason* at para. 14; *Savinkoff v. Seggewiss* (1996), 25 B.C.L.R. (3d) 1 (C.A.) at para. 28.

[27] In this case the trial judge had to determine, based on the facts, whether an inference of negligence should be drawn. In my opinion, the trial judge erred in failing to do so.

[28] The uncontradicted evidence establishes that Mr. Lipka lost control of the vehicle when he caused it to encroach onto the shoulder of the road. Mr. Lipka was fully familiar with the road. He drove it on a daily basis. He was aware of the soft shoulder. His practice was to move to the right while approaching the curve where the accident occurred. He had, however, never previously driven onto the shoulder or lost control of his vehicle. He attributed his loss of control to driving onto the shoulder.

[29] In my view driving onto the shoulder and losing control of the vehicle gives rise to a *prima facie* inference of negligence. On this evidence, the only reasonable inference that can be drawn was that Mr. Lipka drove on the shoulder either because of a lack of attention or because he approached the curve too fast, or both.

[30] Once a *prima facie* case of negligence is proven, the onus shifts to the defendant to rebut the inference through the defence of explanation. A defence of explanation is an explanation of how the accident may have happened without the defendant's negligence: *Singleton v. Morris*, 2010 BCCA 48 at para. 38.

[31] In this case, Mr. Lipka has advanced no explanation as to how the accident may have occurred absent negligence on his part. The lack of an explanation distinguishes this case from cases such as *Singleton* and *Nason*, in which the trial judges found the *prima facie* case of negligence had been rebutted.

[32] In the result, I find the respondents are wholly liable for Mr. Gaebel's damages.

B. Damages

[33] When a trial judge concludes liability has not been established, there is no obligation on the judge to go on and assess damages. In such cases if this Court subsequently reverses the liability assessment, the quantum of damages can then easily be referred back to the trial judge for assessment. If the trial judge does choose to assess damages, the assessment should be done comprehensively and in the same manner as if a finding of liability had been made against the defendant. That then provides a complete record for this Court to review on an appeal.

[34] In this case, the trial judge acknowledged there was no need for her to assess damages. She nevertheless went on to find Mr. Gaebel failed to prove the breach he alleged caused his injuries. In reaching this conclusion, the trial judge did not however embark on a comprehensive review of the damages claim. Rather, she limited her review to assessing Mr. Gaebel's credibility and the evidence of two experts. She then concluded there was a lack of persuasive medical and other

expert evidence to causatively link Mr. Gaebel's complaints of injury to the accident. She made no mention of the evidence of an expert called by the defence, who testified Mr. Gaebel had suffered injuries in the accident. Nor did she mention other evidence that clearly showed Mr. Gaebel suffered some injuries in the accident.

[35] While there is no one approach that must be followed in an assessment of damages, the usual starting point is the claim set out in the pleadings. In this case, Mr. Gaebel pled as follows:

> 8. As a result of the negligence of the Defendants, and each of them, the Plaintiff has suffered injury, loss and damage and in particular:
>
> (a) Blow to head with scalp contusion;
>
> (b) Concussion;
>
> (c) Headaches;
>
> (d) Injury to neck;
>
> (e) Injury to clavicle;
>
> (f) Injury to chest;
>
> (g) Injury to ribs;
>
> (h) Injury to right shoulder;
>
> (i) Injury to right arm;
>
> (j) Injury to right hand with numbness and tingling;
>
> (k) Injury to back;
>
> (l) Injury to sacroiliac;
>
> (m) Chronic pain;
>
> (n) Such further and other injuries as may become apparent or known prior to the trial of this action.
>
> 9. As a result of the injuries, the Plaintiff has undergone and continues to undergo medical care, has suffered and continues to suffer pain and discomfort, emotional upset and has suffered and continues to suffer loss of enjoyment of life.

> 10. As a further result of the injuries, the Plaintiff has suffered impairment and interference with his occupation and has incurred loss of income and income earning capacity, both past and prospective.
>
> 11. As a further result of the injuries, the Plaintiff has suffered interference with and impairment of his capacity to perform certain house maintenance duties and has suffered a loss, both past and prospective.

[36] In her damages assessment, the trial judge dealt with a few of the allegations set out in the statement of claim. She concentrated almost exclusively on the issue of Mr. Gaebel's alleged shoulder injury. Her reasons focus on the evidence of Dr. Chin, an orthopaedic surgeon who treated Mr. Gaebel, and Dr. Armstrong who is qualified as an expert to provide opinion evidence addressing chronic pain. She concluded she could not place any weight on Dr. Chin's opinions because he was given inaccurate and misleading information by Mr. Gaebel about his pre-accident condition. She also concluded she could place little, if any, weight on Dr. Armstrong's opinion, given Dr. Armstrong's report was made without the benefit of Mr. Gaebel's medication and work history. She made no mention of the evidence of Dr. Sohmer, an orthopedic surgeon called by the respondents, who supported Mr. Gaebel's position that he had suffered injuries in the accident.

[37] Even if the trial judge had been correct in rejecting the evidence of Dr. Chin, placing little to no weight on the evidence of Dr. Armstrong, ignoring the evidence of Dr. Sohmer and finding Mr. Gaebel lacked credibility—all of which I note is challenged to various degrees on this appeal—the trial judge had to consider the other evidence in the record establishing injuries separate and apart from Mr. Gaebel's shoulder injury.

[38] There is no question Mr. Gaebel suffered some injuries in the accident. The emergency room records from the Powell River General Hospital indicated that following the accident, Mr. Gaebel was suffering from scalp contusions and lacerations to his hand. The emergency physician's diagnosis was a flexion-extension injury. In a statement given within a week of the accident Mr. Gaebel described his then symptoms. In the days immediately following the accident, on the recommendation of his doctor, Mr. Gaebel took time off work. Mr. Gaebel's common-

law spouse testified concerning the impact of the accident on Mr. Gaebel's normal activities.

[39] On the appeal, the respondents do not suggest Mr. Gaebel suffered no injuries. They submit however that the injuries were minor in nature and can be best dealt with by referring the matter back to the trial judge for a further assessment.

[40] Unfortunately, in the circumstances of this case, such a course of action is not possible. The assessment of damages cannot be carried out in slices. While it would have been appropriate to return the matter to the trial judge if she had made no assessment of damages, that is not what occurred. The trial judge did assess damages. Her finding that Mr. Gaebel suffered no injuries as a result of the accident is clearly wrong. There must be a new trial on damages.

[41] On appeal, Mr. Gaebel challenges certain findings made by the trial judge in regard to the evidence of Dr. Chin and Dr. Armstrong. He also submits the trial judge erred in the manner in which she relied on certain clinical notes. As I am of the view that damages must be assessed in a new trial, subject to one exception, there is no need to discuss the alleged errors.

[42] The exception concerns the trial judge's comment at para. 45 of her reasons where she said:

> I note that it may be problematic for an expert witness, who submits a report in that capacity, to become a treating physician. This situation should be avoided if possible. I have taken that into account in assessing the weight I can place on Dr. Chin's opinions. See: *MacEachern v. Rennie*, 2009 BCSC 939.

[43] With respect, there is no rule of law or practice that a treating physician cannot testify as an expert. To the extent the trial judge suggests that such a practice may be problematical, I am of the view that she erred. *MacEachern v. Rennie*, 2009 BCSC 939 does not stand for that proposition. It concerns the propriety of an opposing party approaching a treating physician to obtain evidence. The weight to be given to the evidence of any physician, whether they be the treating physician or an independent expert, will depend on the circumstances of the

particular case. In many cases, the treating physician will in fact be in the best position to opine on the injuries that a party has suffered.

SUMMARY

[44] In the result, I would allow the appeal, set aside the dismissal of the action, find the respondents liable for the accident and order a new trial on damages. Mr. Gaebel is entitled to the costs of the appeal. I would leave the costs of the first trial to the judge who hears the new damage assessment.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"